

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

Benny Hammons,  
Petitioner

V.

Brian Williams, et al.,  
Respondents

2:14-cv-01902-JAD-GWF

## **Order Granting in Part and Denying in Part Motion to Dismiss and Resolving all other Pending Motions**

[ECF Nos. 35, 48, 49, 52, 56, 57, 79]

10 Hammons brings this § 2254 action to challenge his state-court conviction for burglary and  
11 larceny and his resultant adjudication as a habitual criminal. Respondents move to dismiss all of  
12 Hammons’s claims as duplicative, conclusory, or procedurally barred.<sup>1</sup> I dismiss grounds 4, 5,  
13 13–15, and 16–44, permit grounds 1–3 and 6–12 to proceed, and order respondents to answer these  
14 remaining grounds by November 9, 2016. I also grant Hammons’s motion to withdraw his motion to  
15 stay<sup>2</sup> and deny all other pending motions.<sup>3</sup>

## Background

17 On January 27, 2010, a jury found Hammons guilty of burglary and grand larceny.<sup>4</sup> The state  
18 court district judge adjudicated Hammons a habitual criminal and sentenced him to two consecutive  
19 terms of life with the possibility of parole after ten years.<sup>5</sup> The judgment of conviction was filed that  
20 April, and the Nevada Supreme Court affirmed Hammons's conviction and sentence.<sup>6</sup>

<sup>1</sup> ECF No. 35.

<sup>2</sup> ECF No. 59.

<sup>3</sup> ECF Nos. 48, 52, 56, 57.

4 ECF No 17-25

<sup>5</sup> ECF No. 18-2

6 ECE No. 19-4

1 In February 2012, Hammons filed a pro se post-conviction habeas petition in state district  
2 court.<sup>7</sup> The state district court appointed counsel, who filed a supplemental petition on Hammons's  
3 behalf.<sup>8</sup> After an evidentiary hearing, the state district court denied the petition,<sup>9</sup> and the Nevada  
4 Supreme Court affirmed.<sup>10</sup> Hammons timely dispatched his federal habeas petition on November 10,  
5 2014.<sup>11</sup> Respondents move to dismiss Hammons's third-amended petition, arguing that all of his  
6 claims are either conclusory, duplicative, or procedurally barred. Hamons has filed motions for a  
7 copy of his first and third-amended petitions,<sup>12</sup> a motion to stay the proceedings,<sup>13</sup> an amended  
8 motion to stay the proceedings,<sup>14</sup> and a motion to withdraw his amended motion to stay.<sup>15</sup> Finally,  
9 respondents move to strike Hammons's surreply to their motion to dismiss.<sup>16</sup>

## Discussion

11 A. **Ground four is denied because it is not cognizable on federal habeas review.**

12       Alleged errors in the interpretation or application of state law are not cognizable on federal  
13 habeas review.<sup>17</sup> In ground four, Hammons alleges that there was insufficient evidence to support  
14 his habitual-criminal adjudication because the state failed to prove beyond a reasonable doubt that he

17 || 7 ECF No. 19-7.

<sup>18</sup> ¶ <sup>8</sup> ECF Nos. 19-13, 19-14.

<sup>19</sup> ¶ <sup>9</sup> ECF Nos. 19-25, 20-7.

20 || <sup>10</sup> ECF No. 21-5

21 || 11 ECE No. 7

22 || 12 ECE Nos. 48-52

23 || 13 ECE N- 40

24 || 14 ESEN - 56

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<sup>28</sup> *Hubbard v. Knapp*, 575 F.3d 775, 779-80 (9th Cir. 2004).

1 had three prior felony convictions as is required by Nevada's habitual-criminal statute.<sup>18</sup> Because  
 2 ground four challenges the state trial and appellate court's application of Nevada's habitual-criminal  
 3 statute, it is not cognizable on federal habeas review. Accordingly, ground four is denied.

4 **B. Grounds 1–3 and 5–15 are partially exhausted.**

5 A federal habeas petitioner must first exhaust state-court remedies on a claim before  
 6 presenting that claim to the federal court.<sup>19</sup> The exhaustion requirement ensures that the state courts  
 7 will have the first opportunity to pass upon and correct alleged violations of federal constitutional  
 8 guarantees.<sup>20</sup> To satisfy the exhaustion requirement, a petitioner must fairly present his claims to the  
 9 state's highest court.<sup>21</sup> Fair presentation requires that a petitioner (1) identify the federal legal basis  
 10 for his claims and (2) state the facts entitling him to relief on those claims.<sup>22</sup> A petitioner must alert  
 11 the state court to the fact that he is asserting a federal claim;<sup>23</sup> mere similarity between a state-law  
 12 claim and a federal-law claim is insufficient.<sup>24</sup>

13 Hammons invokes the protections of the Sixth, Eighth, and Fourteenth Amendments for each  
 14 of his claims.<sup>25</sup> Hammons raised the facts supporting these grounds verbatim in his post-conviction  
 15 appeal to the Nevada Supreme Court,<sup>26</sup> but he did not there identify all three of these amendments as  
 16 the federal bases for these claims. These claims are exhausted only to the extent that Hammons

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 18 <sup>18</sup> ECF No. 31 at 20–21.

19 <sup>19</sup> 28 U.S.C. § 2254(b)(1)(A).

20 <sup>20</sup> See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

21 <sup>21</sup> See e.g., *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc); *Yang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003).

22 <sup>22</sup> See *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000); *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005).

23 <sup>23</sup> *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995).

24 <sup>24</sup> See *Henry*, 513 U.S. at 366; see also *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).

25 <sup>25</sup> ECF No. 35 at 5–6

26 <sup>26</sup> ECF Nos. 31 at 3–65; 20–15.

1 identified their federal basis to the Nevada Supreme Court.

2 Hammons presented grounds 1–3 and 6–12 on post-conviction appeal as Sixth Amendment  
 3 ineffective-assistance-of-counsel claims.<sup>27</sup> Thus, these claims are exhausted to that extent only.  
 4 Hammons presented ground five to the Nevada Supreme Court as a claim that the trial court  
 5 deprived him of his Sixth and Fourteenth Amendment due-process rights to testify in his own  
 6 defense.<sup>28</sup> Ground five is therefore exhausted to the extent that it raises Sixth and Fourteenth  
 7 Amendment claims. Ground 13 is exhausted to the extent that it raises Eighth and Fourteenth  
 8 Amendment claims,<sup>29</sup> and ground 15 is exhausted as a Fourteenth Amendment claim only.<sup>30</sup>

9 **C. Grounds 5, 13, and 15 are procedurally barred.**

10 Procedural default occurs when a petitioner presents a claim to the state court but the state  
 11 court disposes of the claim on independent and adequate state procedural grounds instead of on the  
 12 merits. Federal habeas review of procedurally defaulted claims is barred unless “the prisoner can  
 13 demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal  
 14 law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of  
 15 justice.”<sup>31</sup> To demonstrate cause to excuse a procedural default, the petitioner must show that some  
 16 external impediment prevented him from raising the claim.<sup>32</sup>

17 The Nevada Supreme Court affirmed the denial of claims 5, 13, and 15 as procedurally  
 18 barred under NRS § 34.810(1)(b) because they could have been raised on direct appeal, and  
 19 Hammons failed to do so.<sup>33</sup> The Ninth Circuit Court of Appeals has held that, at least in non-capital

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21 <sup>27</sup> Compare ECF No. 31 at 3–18, 27–53, with ECF No. 20-15 at 9–19, 23–35.

22 <sup>28</sup> Compare ECF No. 31 at 23–25, with ECF No. 20-15 at 21–23.

23 <sup>29</sup> Compare ECF No. 31 at 55–59, with ECF No. 20-15 at 36–39.

24 <sup>30</sup> Compare ECF No. 31 at 64, with ECF Nos. 20-15 at 41, 21-6 at 9.

25 <sup>31</sup> *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

26 <sup>32</sup> *Murray*, 477 U.S. at 488; *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

27 <sup>33</sup> ECF No. 21-6 at 9–10.

1 cases, application of NRS § 34.810 is an independent and adequate state ground barring federal  
 2 habeas review if the state court did not “consider the merits of [the] constitutional claim when  
 3 deciding” whether to apply the bar.<sup>34</sup> The Nevada Supreme Court did not consider the merits of  
 4 these constitutional claims when deciding whether to apply the NRS § 34.810 bar, so these claims  
 5 are procedurally barred from federal habeas review absent a showing of cause and prejudice.  
 6 Hammons does not argue—or make any attempt to show—that he can demonstrate cause and  
 7 prejudice to excuse his default. Accordingly, grounds 5, 14, and 15 are denied as procedurally  
 8 barred.

9 **D. Grounds 14 and 16–44 are denied.**

10 I agree with respondents that grounds 16–44 are duplicative of claims 1–15 because they rely  
 11 on the same operative facts and assert the same legal theories. I therefore deny these claims as  
 12 duplicative. Additionally, nine of the 13 subclaims included in ground 14 are duplicative of claims  
 13 1–15.<sup>35</sup> The remaining four subclaims in ground 14 are purely conclusory: (5) trial counsel failed to  
 14 object to hearsay and double hearsay allegedly heard by the court and/or relied upon in the  
 15 development of the state’s case; (10) trial counsel was ineffective for failing to file any pre-trial  
 16 evidentiary motions; (11) trial counsel failed to present a valid defense by using supporting law and  
 17 facts to rebut the state’s case; and (12) the district court abused its discretion by allowing counsel to  
 18 remain as attorney of record for Hammons despite knowing about a conflict of interest.<sup>36</sup> These  
 19 vague and conclusory allegations do not state grounds for federal habeas relief.<sup>37</sup> I therefore deny  
 20 ground 14 as duplicative, vague and conclusory.

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23 <sup>34</sup> *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003).

24 <sup>35</sup> ECF No. 35 at 8–9.

25 <sup>36</sup> ECF No. 31 at 61–62.

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 27 <sup>37</sup> *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (internal citations omitted) (A petition  
 28 may be summarily dismissed if the allegations in it are “vague, conclusory, palpably incredible,  
 29 patently frivolous or false.”).

## Conclusion

2 Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that **respondents'**  
3 **motion to dismiss [ECF No. 35] is GRANTED in part and DENIED in part:**

4 Ground 4 is DISMISSED as noncognizable;

7 Grounds 5, 13, and 15 are DISMISSED as procedurally barred.

8 ||| Grounds 16–44 are DISMISSED as duplicative.

9 Ground 14 is DISMISSED as conclusory and duplicative.

10 IT IS FURTHER ORDERED that respondents must file an answer to the remaining  
11 grounds in Hammons's third-amended petition by November 9, 2016. Hammons will have 30  
12 days from service of respondents' answer to file a reply.

13 IT IS FURTHER ORDERED that Hammons's **motion to withdraw his motion to stay**  
14 **[ECF No. 59]** is GRANTED. The Clerk of Court is directed to **STRIKE ECF No. 59**.

15 IT IS FURTHER ORDERED that Hammons's motions for copies [ECF Nos. 48, 52],  
16 **motion to stay [ECF No. 49], and amended motion to stay [ECF No. 56]** are all DENIED as  
17 moot.

18 IT IS FURTHER ORDERED that **respondents' motion to strike Hammons's surreply**  
19 **[ECF No. 57]** is DENIED.

20 Dated this 9th day of September

  
Jennifer A. Dorsey  
United States District Judge